

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2028 OF 1992

1. Nyaya Darshan Co-operative Housing Society Ltd., a Co-operative housing society duly registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 having its registered office at Plot No.386A, T.P.S. III, Opposite Don Bosco School, Borivli (West), Bombay - 400 092.
2. Chandru Tolani of Bombay, Indian inhabitant residing at Bhagnari, Duncan Causeway Street, Chunnabhati, Bombay - 400 022 .. Petitioners.

V/s.

1. State of Maharashtra, Secretary, Revenue & Forests Department, through The Government Pleader (O.S.), High Court, Bombay 400 023
2. The Additional Collector, Bombay Suburban District, having his office at B.M.R.D.A. Building, 2nd Floor, Bandra (East), Bombay - 400 051 .. Respondents.

Mr.Sagar J. Kadam i/b. S. Mohomedbhai & Co. for the petitioners.

Mr.Niranjan Pandit, AGP for the respondents.

CORAM : R.M. LODHA &
J.P. DEVADHAR, JJ.

DATED : 5TH AUGUST, 2005.
ORAL JUDGMENT (Per R.M. Lodha, J.) :

The petitioners have filed this writ petition invoking jurisdiction of this Court under Article 226 of the Constitution of India for the following reliefs :

"(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other Writ, Order or direction under Article 226 of the Constitution of India calling for the files of the Respondents pertaining to the allotment of the said property bearing Plot No.386A of T.P.S. III at Borivali to the 1st Petitioner and the files relating to the impugned action of non-allotment of a plot of land out of the Government layouts situate at Village Versova, Andheri, Bombay a Statement whereof is at Exhibit "T" to the Petition and the order dated 14/15.10.1992 at Exhibit "Y" to the Petition and after looking into the legality of the impugned action and the order dated 14-14.10.1992 of Exhibit "Y" to the Petition to quash and/or set aside the same:

(b) that this Hon'ble Court be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India directing the Respondents to allot and grant physical possession to the 1st Petitioner a Suitable Plot of land out of the layouts of the 1st Respondent situate at Village Versova, Andheri a Statement whereof is at Exhibit "T" to the Petition or any other suitable comparable plot of land of a minimum area of 1145 sq. metres in the vicinity in lieu of the said property bearing Plot No.386A of T.P.S. III, Borivali allotted to the 1st Petitioner in February, 1984;"

2. The first petitioner is a co-operative

housing society registered under the provisions of the Maharashtra Co-operative Societies Act. Its object is to provide cheap housing in multi storeyed buildings to be constructed by them. 20% members of the first petitioner - society are said to belong to the backward community. Its members have a monthly income of less than Rs.2,000/-. By an order dated March 29, 1984 the Government land admeasuring 999.84 square meters [i.e. 1190 square yards] out of final plot No.386 of T.P.S. III of Survey No.144 of Borivali Taluka Borivali in Bombay Suburban District Society was allotted to the first petitioner - society for construction of multi-storeyed buildings and to accommodate its approved members. The allotment of the land granted to the first petitioner - society was on the terms and conditions mentioned in Schedule A attached to the order dated March 29, 1984. The first petitioner society deposited an amount of Rs.30,000/- on account of occupancy price of the aforesaid plot. On April 10, 1984, the first petitioner - society was handed over possession of land bearing C.T.S. No. 113-C, Survey No.114, Plot No.386 (part) Borivali admeasuring 975.8 square meters. By the communication dated June 1, 1984, the first petitioner -society was informed by the Office of the Additional District Collector, Bombay Suburban District not to erect any construction on the land

allotted to them until further order. It appears that the society took up the matter with the Ministry of Revenue for direction to the Additional Collector of Bombay to withdraw the communication dated June 1, 1984 to enable the first petitioner - society to proceed with the development of the land allotted to them.

3. It appears that the land allotted to the first petitioner - society came to be enhanced in the modified blueprint by 145 square meters and the first petitioner - society was asked to deposit a further sum of Rs.4,354.80 which it did. The case of the petitioners is that the allotted land was encroached by the Trustees of the Ganesh Temple and one Mr.Daruwala. The first petitioner - society took up the matter with the concerned authorities for removal of encroachment from the plot allotted to them. It may be noticed here that in the light of the encroachment that was found on final Plot No.386A in Town Planning Scheme, Borivali No.III, the Arbitrator, Town Planning Schemes, Bombay proposed to the first petitioner - society allotment of final Plot No.365-C or final Plot No.420 of final Plot No.400 in the aforesaid scheme in lieu of final Plot No.386A which has already been allotted to the first petitioner - society. By the communication dated

August 29, 1986 the first petitioner - society informed the Arbitrator, Town Planning Scheme, Mumbai not to change the allotment of final Plot No.386A and requested for removal of unauthorised construction / encroachment.

4. The said Mr.Daruwala was issued notice under the Land Revenue Code for removal of encroachment. He first filed civil suit before the City Civil Court and took out a notice of motion for interim relief therein. No interim relief was granted in his favour. Then he filed a writ petition No.1356 of 1986. The writ petition was summarily rejected. An appeal was filed by him against the summary rejection of the writ petition. The Division Bench admitted the writ petition and ad-interim relief came to be granted in his favour. The Division Bench, however, gave liberty to the respondents to apply to the Single Judge for vacation or modification of the stay order.

5. The petitioners filed writ petition before this Court being Writ Petition No.1887 of 1991 praying therein that the authorities be directed to remove the encroachments and hand over vacant peaceful possession of final Plot No.386A and not to grant fresh allotment from the layout lands of

Village Versova for minimum area of 1114 square meters. In other words, the prayers made in the present writ were the prayers in writ petition No.1887 of 1991. The said writ petition was withdrawn as the petitioners desired to move the State Government for sympathetic consideration of the matter. The petitioners, thereafter made representations to the State Government on July 15, 1991, November 25, 1991, March 16, 1992, April 8, 1992 and June 3, 1992.

6. On September 3, 1992 the present writ petition was filed. After the present writ petition was filed, by the communication dated 14/15th October, 1992 addressed to the Government Pleader, the State Government informed that possession of the plot was already handed over to the first petitioner - society but the society failed to protect the land and that the Government is not bound to give any alternative plot of land to the first petitioner - society. The petitioners amended the writ petition and prayed for quashing of communication dated 14/15th October, 1992. The amended prayers have already been quoted by us in the beginning of this judgment.

7. We heard the learned counsel for the

petitioners and the learned Assistant Government Pleader.

8. The submission of the learned counsel for the petitioners is that final Plot No.386A that was allotted to the first petitioner - society was encroached right from the beginning and at no point of time the entire plot admeasuring 999.84 square meters was handed over to the first petitioner - society and the petitioners having paid full occupancy price is entitled to get the unencroached plot of land. The learned counsel would also submit that by the order dated June 1, 1984, the Additional Collector, Bombay Suburban District had directed the first petitioner - society not to erect any construction whatsoever on the land allotted to them and that stay order was never vacated and, therefore, the petitioners were unable to protect that plot of land from the encroachment. He thus submitted that the first petitioner - society is entitled to the alternative plot of land of the same size out of the Government layouts situate at Versova, Andheri, statement thereof attached at Exhibit "T" or in the alternative any other suitable plot of land of a minimum area of 1140 square meters in the vicinity in lieu of plot No.386A that was allotted to the first petitioner - society in the month of February, 1984.

Lastly he submitted that if the petitioners are not held entitled to the alternative plot of land, the respondents must be directed to remove the encroachment from final Plot No.386A that has been allotted to the first petitioner - society.

9. We reflected over the submissions of the learned counsel for the petitioners.

10. The order of allotment dated March 23, 1984 whereby the first petitioner - society was allotted Government land reads thus :

"The Government land Admeasuring 999.84 sq.mtr. (i.e. 1190 sq.yards) out of F.P.No.386 of T.P.S. III of S.No.144 of Borivali Taluka Borivali in Bombay Suburban District Society to construct multi storeyed buildings and to accommodate its approved members whose list is appended of Rs.30,000/- in this office on 2-2-1984. The Society has been registered under the Co-operative Societies Act vice No.BOM/BSG/R/9862/84 dated 8-3-1984. The Society has also executed an agreement agreeing to the term and conditions fixed by the Government. The land is granted to the Society on the special terms and conditions mentioned in Schedule 'A' attached hereto."

11. On April 10, 1984 the first petitioner - society was given actual possession of 975.84 square meters out of the land from plot No.386 (part) pursuant to the allotment order dated March 23, 1984 does not seem to be in doubt. The possession receipt - Exhibit "D" on record reads thus :

"I, Shri R.A. SHELATKAR on behalf of DILR cum C.T.S. VI, BSD and Shri Chandru Tolani Secretary Nyay Darshan Co-operative Housing Society Ltd., Borivali, Bombay representative of Tahasildar, Borivali have handed over and taken over the possession of land bearing C.T.S.No.113-C, S.No.144, Plot No.386 Pt. of Village Borivali, Taluka Borivali, area admeasuring 975.8 sq.meter as per Additional Collector, Bombay Suburban District, Bombay's Order No.C/Desk/I/LND/III/WS/1447/83 dated 29-3-1984.

Seal

Demarcated on site
possession taken over
without structure

Dated 10-4-1984

Sd/-
10-4-1984.
Taken over by

Sd/-
Borivali
Tahsildar-Borivali.

Handed over by
sd/-

From the aforesaid possession receipt, the case that the first petitioner - society was not given vacant possession of the plot allotted to them is falsified to the extent of 975.8 square meters of the land. It is true that the first petitioner-society was allotted the plot of land admeasuring 999.84 square meters out of final Plot No.386A of T.P.S. III of Survey No.144 of Borivali. The actual physical possession was given to the first petitioner of an area of 975.8 square meters instead of 999.84 square meters. However, insofar as the

plot admeasuring area of 975.8 square meters is concerned, the possession was given of unencroached land. This position is admitted by the first petitioner - society in its communication dated June 12, 1984 to the Minister of Revenue wherein it was recorded thus :

"We have been put into possession of the said plot by the Department concerned on 10-4-1984."

12. We have thus no hesitation in holding that the first petitioner - society was actually put in possession of the plot of land allotted to them admeasuring 975.8 square meters on April 10, 1984. Having been put in possession of the plot of land, it was the responsibility of the first petitioner - society to protect the said plot of land from encroachment or unauthorised occupation. Merely because by the communication dated June 1, 1984 the first petitioner - society was asked not to erect any construction by the Additional Collector, that did not preclude the first petitioner - society from protecting the plot of land that was allotted to them and of which they were put in possession. By the order dated June 1, 1984 there was no impediment in putting up the marked wire fencing for protection of the said plot. Moreover, the fact of the matter is that the first petitioner - society was offered

alternative plot of land by communication dated August 14, 1986 by the Office of the Arbitrator, Town Planning Scheme, Bombay. The first petitioner - society in its response to letter dated August 14, 1986 rejected the offer of alternative allotment and prayed that the allotment of final Plot No.386A that is made in their favour need not be changed. Now it is too late in the day for the petitioners to claim alternative plot of land.

13. More importantly, prior to the present writ petition, the petitioners filed writ petition before this Court being Writ Petition No.1887 of 1991 praying therein that the authorities be directed to remove the encroachments and hand over vacant possession of old final Plot No.386A and in the alternative grant the petitioners fresh allotment from the layout lands of Village Versova for minimum area of 1114 square meters. The said writ petition came up for admission before this Court on July 8, 1991 and was withdrawn by the following order :

"Allowed to be withdrawn on application of Counsel for the Petitioners as Petitioners desire to move Government for sympathetic consideration of request made."

14. Nobody would withdraw the writ petition if the Court decided to entertain the writ petition. Obviously, the writ petition was withdrawn by the

petitioners because the Court was not inclined to admit. There is no liberty granted to the petitioners for filing fresh writ petition. The petitioners sought the writ petition to be withdrawn as they wanted to move the State Government for sympathetic consideration of their request. That request was turned down by the State Government vide communication dated 14-15th October, 1992 does not mean that the petitioners were at liberty to reagitate the controversy that has been raised by them in the earlier writ petition No.1887 of 1991 and that writ petition was withdrawn.

15. We are thus satisfied that no case for grant of any relief is made out. The writ petition is liable to be dismissed and we order accordingly.

16. However, the petitioners shall be at liberty to take appropriate steps in law for removal of encroachment /unauthorised occupants over final Plot No.386A of T.P.S. III allotted to them. We also observe that whatever action can be taken by the respondents in law for removal of unauthorised construction / encroachment shall be taken by them if there is no restraint order by any Court in that regard.

17. With the aforesaid observations, rule is discharged. No costs.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)